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Explanatory Paper: Proposed Amendments to the Indian Act Affecting Indian Registration

McIvor v. Canada

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Introduction

Over the years, the federal *Indian Act* has come under criticism as being outdated and stemming from a time before gender equality was guaranteed under the law. Despite amendments made to the *Indian Act* in 1985 to bring the legislation into compliance with the 1982 *Canadian Charter of Rights and Freedoms*, there have been allegations that there is lingering gender discrimination. Several court cases were commenced to pursue these allegations. The *McIvor v. Canada* case is the only one to have been decided at this time.

On April 6, 2009 the Court of Appeal for British Columbia issued its decision in *McIvor v. Canada*. The Court agreed with the June 8, 2007, decision of the Supreme Court of British Columbia that section 6 of the *Indian Act*, dealing with Indian registration, infringes on section 15 of the Canadian Charter of Rights and Freedoms, and that the infringement is not justified under section 1 of the Charter. The Court of Appeal made an order declaring subsections 6(1)(a) and 6(1)(c) of the *Indian Act* to be of no force and effect, but suspended its declaration of invalidity for a period of 12 months in order to allow Parliament time to develop a legislative solution.

On June 2, 2009 it was announced that Canada would not seek leave to appeal the decision to the Supreme Court of Canada and would begin the process of implementing changes to the *Indian Act*. Although she had been successful in her challenge of the *Indian Act*, Ms. McIvor sought leave to appeal the decision to the Supreme Court of Canada to continue her quest to seek a broader decision. Her application for leave to appeal was dismissed by the Supreme Court of Canada on November 5, 2009.

In August 2009 the federal government announced that it would develop legislative amendments to respond to the *McIvor* decision. The release of a public Discussion Paper at the same time

marked the launch of an engagement process with Aboriginal organizations to help people better understand the implications of the *McIvor* decision and the government's proposed response. A report is available on the department's website about the engagement process, which was completed on November 13, 2009.

A Pragmatic Approach

On April 6, 2010 the suspension of the Court's declaration will expire and the Government's goal is to have legislative amendments in place by then. During engagement on the proposed legislation many participants raised a number of issues relating to registration, membership and citizenship that go beyond the specifics of the *McIvor* decision. However, these broader issues are complex and will not be resolved overnight or in isolation. The Government agrees, nevertheless, that it is important to explore these issues. Accordingly, the Minister of Indian Affairs and Northern Development will work in partnership with national Aboriginal organizations to establish an exploratory process that will invite First Nations and other Aboriginal groups and organizations at all levels to participate in an inclusive process for the purpose of information gathering and the identification of the broader issues surrounding Indian registration, band membership and First Nations citizenship.

In the immediate term, however, the *Indian Act* needs to be amended to remedy the specific problem of discrimination brought to light in the case of Sharon McIvor and her family, as analyzed by the decision of the Court of Appeal for British Columbia. Therefore the Government believes that the best course for now is to limit legislative changes to the registration rules to those that are directly in line with the recent court decision.

The Amendment Concept

In this pragmatic spirit, the Government proposes to amend the *Indian Act* to accomplish the goal of providing Indian registration under s. 6(2) of the *Indian Act* to the grandchild of a woman:

(a) who lost status due to marrying a non-Indian; and

(*b*) whose child born of that marriage[1] parented the grandchild with a non-Indian after September 4,1951 (when the "double mother" rule was first included in the *Indian Act*); as well as any sibling of that grandchild born before September 4, 1951.

[1] The amendment will also apply to a child born to a subsequent union with a non-Indian provided that, if the child was born after April 17, 1985, the parents of the child married each other prior to that date.

Provisions Regarding Registration

To accomplish this goal a new paragraph 6(1)(c.1) will be added to the *Indian Act* granting entitlement to registration to any individual:

- whose mother lost Indian status upon marrying a non-Indian man;
- whose father is a non-Indian;
- who was born after the mother lost Indian status but before April 17, 1985, unless the individual's parents married each other prior to that date; and
- who had a child with a non-Indian on or after September 4, 1951.

By this means, a child of an individual covered by paragraph 6(1)(c.1) (whether born before, on, or after September 4, 1951) will be entitled to registration under subsection 6(2) of the *Indian Act* (or under subsection 6(1)(f) if the other parent is also an Indian).

The proposed amendments will also re-enact the provisions struck down by the decision of the Court of Appeal for British Columbia, i.e. paragraphs 6(1)(a) and 6(1)(c). If passed after the deadline imposed by the British Columbia Court of Appeal, the *Act* will come into force on the day before that date. This is to protect the entitlement to registration of persons registered or entitled to be registered under those paragraphs.

Moreover, for greater certainty, there will be provisions protecting existing registrations, and ensuring the right to rely on past entitlements to registration to register descendants under paragraph 6(1)(f) and subsection 6(2). This way no one with an entitlement to registration before the proposed amendments take effect will lose that entitlement because of them.

While the proposed amendments will protect past entitlements, the new entitlements conferred by enactment of the new paragraph 6(1)(c.1) will apply only after the amendments take effect.
Thus benefits associated with registration (or band membership, as described below) for persons newly registered as a result of this paragraph could not be claimed for a period prior to the coming into force of these proposed amendments.

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Provisions Regarding Band Membership

The amendments will protect the existing band membership or entitlement to band membership of individuals covered by the new paragraph 6(1)(c.1). If the Department of Indian Affairs and Northern Development maintains the band list of their band of affiliation, under section 11 of the *Indian Act*, they are entitled to membership in that band. If their band of affiliation has assumed control of their own membership under section 10 of the *Indian Act*, their membership is determined by the membership rules adopted by the band. This provision of the amendments will be subject to membership rules adopted after the coming into force of the proposed amendments.

The band membership entitlement of the children of those covered by paragraph 6(1)(c.1), i.e. those newly entitled to registration under subsection 6(2), will be determined according to the current band membership rules, if their band of affiliation has control of its membership. Otherwise, these persons will be entitled to membership in their parent's band.

Impacts of the Proposed Amendments

It is difficult to specify exactly how many people will be affected by the *Indian Act* amendments as described above. The complexity of families and fertility patterns, as well as limitations on the information available to the Indian Registrar favour caution in making estimates. Nevertheless, to assist in understanding the possible effects, it is useful to offer the best available idea of the likely impact on the registered Indian population.

Overall, the Department of Indian Affairs and Northern Development believes that the total number of persons newly entitled to registration under the *Indian Act* resulting from such an amendment would number in the range of 45,000[2]. This range would result in an increase of about 6% of the existing status population. There would, of course, be additional registrations in the future, as new registrants themselves have additional children that meet the rules for obtaining Indian status.

The impact on the membership of individual First Nations communities (bands) is even more challenging to specify. In this regard, it is worth recalling that over 230 bands have their own

[2] This estimate is larger than the range of 20,000 to 40,000 identified in the Discussion Paper released by the Minister of Indian Affairs and Northern Development in August, 2009. This new estimate is based on work completed in autumn 2009 by Mr. Stewart Clatworthy, a noted demographer of First Nations. The new estimates benefit in particular from analysis of the so-called "black" Register, the pre-digital hard copy Indian Register.

membership codes, which are quite varied. For First Nations that do not control their own membership, new registrants will be added to the appropriate band list by the Indian Registrar.

As with those registered as a result of Bill C-31, the great majority of those people newly entitled to registration likely live off reserve or Crown land. Thus there may be limited demand for on-reserve housing and services. Voting lists would be affected, however, since off-reserve First Nations members generally have the right to vote in band elections.

Essentially, new registrants under the *Indian Act* will have the same access to programs as do existing status Indians. For programs such as extended health benefits, eligibility depends on status and circumstances. Tax exemptions apply to people based on registration, and in some cases on where they live or derive their income. Other programs, such as post-secondary education financial assistance, are limited in total funding, so access depends on various criteria. Funding for on-reserve programs and services is worked out according to various policies and criteria, largely based on residency on reserve.

Conclusion

The urgency of meeting the April 6, 2010 deadline for amending the *Indian Act* makes it important that the Government act now to implement the necessary changes. However, if the *Indian Act* is not amended by the deadline, it is important to emphasize several points. First, no one who has been included in the Indian Register under the existing law will lose his or her status. Second, unless courts in other provinces deal with these issues, the process of registration would be cast into doubt only in the province of British Columbia.

The Government is moving ahead with the necessary amendments, but nonetheless recognizes the importance of exploring alternative approaches to the current system. Accordingly, the Minister of Indian Affairs and Northern Development will work in partnership with national Aboriginal organizations to establish an inclusive exploratory process that will invite the participation of First Nations and other Aboriginal groups and organizations at all levels for the purpose of information gathering and the identification of the broader issues for discussion.